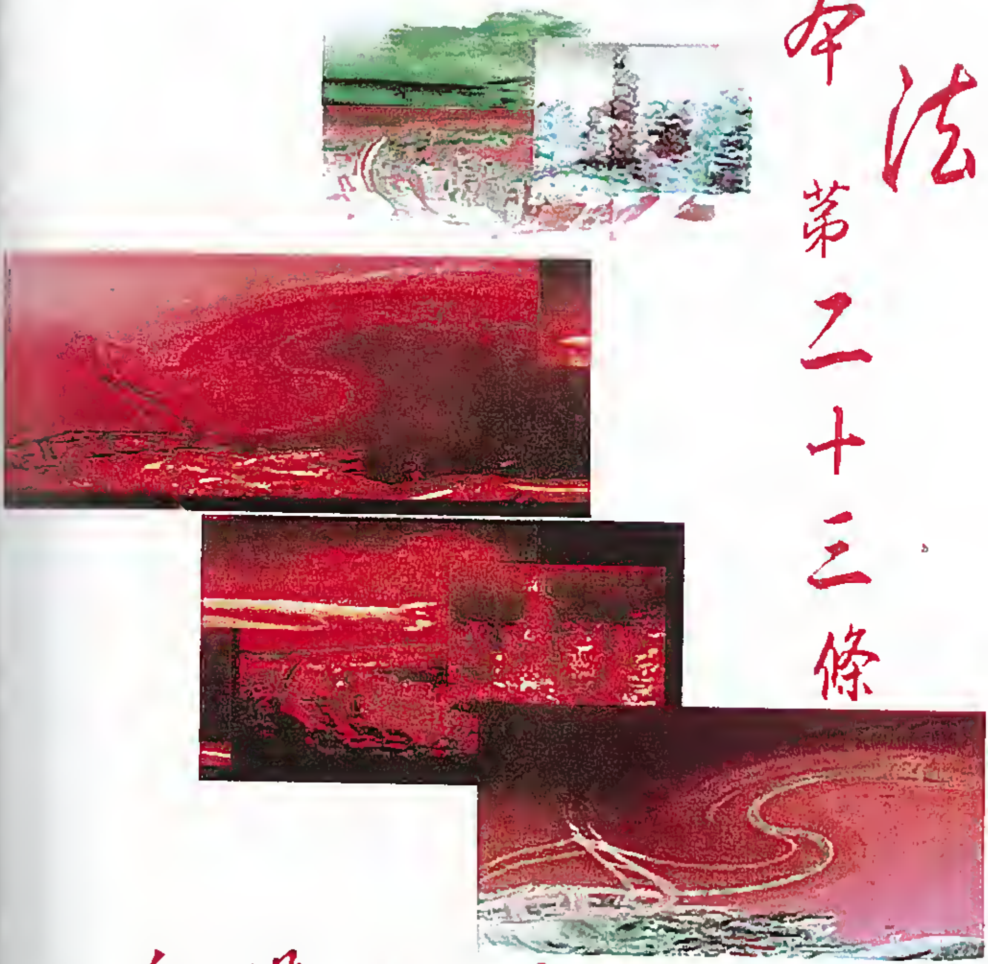
基本法第二十三條



香港人的夢魘？

引言

「特區政府提出的建議、絕對不會、絕對不會減少現時本港市民所享有的自由和人權，亦不會、絕對不會影響市民目前的生活方式。」特首董建華對於落實基本法第二十三條有以下「強烈」的承諾。言猶在耳，保安局局長葉劉淑儀又強調立法只是爲全面落實《基本法》，而「危害國家是非常罕有的罪行，和一般酒樓侍應、的士司機、家庭主婦、學生是無關的。」

可是，一般小市民卻擔心現時享有的自由會被剝削，例如以後不能再與台獨思想的朋友來往、警員會以懷疑危害國家安全爲藉口隨便入屋搜查，更有人形容立法是「白色恐怖」、「驚到震晒」；而被認爲是「高危」的坊間團體如支聯會、法輪功等就紛紛抗議，認爲條例打壓市民的自由。

當政府和葉太聲稱不明白「市民爲乜驚到震」的時候，您對第二十三條所訂的「七宗罪」又認識幾多呢？希望這本小冊能令大家對基本法第二十三條有初步的認識，並填妥本小冊尾頁的意見表，表達您的看法，我們將於諮詢期內把意見提交到政府。唏！還等甚麼？快些開始「認識七宗罪」吧！

廿三條知多少？

《基本法》第二條訂明，香港特別行政區實行高度自治；第五條又訂明，特區不實行社會主義制度和政策，因此保護國家根本利益和國家安全的全國性法律不在特區公布實施；而第二十三條則訂明，香港特別行政區「應自行立法禁止任何叛國、分裂國家、煽動叛亂、顛覆中央人民政府及竊取國家機密的行爲、禁止外國的政治性組織或團體在香港特別行政區進行政治活動、禁止香港特別行政區的政治性組織或團體與外國的政治性組織或團體建立聯繫。」所以衍生今次爲「七宗罪」立法的討論。

特區今次將爲叛國、分裂國家、煽動叛亂、顛覆、竊取國家機密、禁止外國的政治性組織在特區進行政治活動，及禁止特區的政治性組織與外國的政治性組織建立聯繫這「七宗罪」立法。而保安局對立法有以下建議：

(一) 叛國

當局建議修訂《刑事罪行條例》第 I 部有關叛逆的條文，把實質罪行局限於

(1) 與外國人聯手發動戰爭，旨在推翻中華人民共和國政府或其政策，或向政府施加武力及作出威嚇；
(2) 鼓動外國人入侵中華人民共和國；或以任何方式協助與國家交戰的公敵。

當局亦建議將企圖干犯、協助和教唆以及隱匿叛國（即知道另一人犯了叛國罪而沒有舉報）編纂爲成文法例。

(二) 分裂國家

當局建議新加入分裂國家的罪行，規定將發動戰爭、或以武力及其他嚴重非法手段將中華人民共和國一部分從主權中分離出去或抗拒中央人民政府中華人民國和國一部分行使主權，列爲「分裂國家」罪，也建議將企圖干犯、協助和教唆他人干犯分裂國家的實質罪行，以及串謀干犯該實質罪行，訂爲特定罪行。

(三) 煽動叛亂

保安局建議把現行的煽動罪的定義收窄，任何人煽動他人干犯叛國、分裂國家或顛覆行爲，或製造嚴重危害國家或特區穩定的暴力事件或公眾騷亂，即屬犯罪。

干犯下列行爲，即在知情或有合理理由懷疑某刊物是煽動刊物（定義爲「會煽動他人干犯叛國、分裂國家或顛覆的實質罪行的刊物」）的情況下處理或管有該刊物，而沒有合理辯解，即屬犯罪。

純粹發表意見，或就意見或作爲作出報道或評論，均不會列爲刑事罪行；除非這些意見、報道或評論煽動他人以發動戰爭、使用武力或嚴重非法手段達到某指定目的。

(四) 顛覆

當局建議把發動戰爭、或以武力及其他嚴重非法手段推翻政府或廢除憲法所確立的國家根本制度，界定爲顛覆罪，也建議把企圖干犯、協助和教唆他人干犯實質罪行，以及串謀干犯實質罪行訂爲法定罪行。

(五) 竊取國家機密

當局建議保留現有《官方機密條例》的規定，訂明竊取國家機密罪，未經授權而取得受保護資料及作出具損害性的披露，即屬犯罪。

保護對象如下——

(1) 就諜報活動而言，可能會對敵人有用的資料，而有關資料是爲了損害中華人民共和國或香港特區的安全或利益而取得或披露的；

(2) 就非法披露而言，保安及情報資料、防務資料、有關國際關係的資料、有關中央與特區關係的資料、以及有關犯罪和刑事調查的資料。

(六) 外國組織干預本地政治事務

當局認爲現時《社團條例》的條文足以禁止外國政治性組織不當地干預本地的政治事務，因此應予保留。

(七) 本地組織與外國組織有聯繫

根據現時的《社團條例》，保安局局長可在爲維護國家安全而必要的情況下，宣布香港特區的某個組織爲非法組織。如該組織的目的是從事任何干犯叛國、分裂國家、煽動叛亂、顛覆、或諜報罪的行爲，或該組織已作出有關行爲；或該組織從屬於某個被中央機關根據國家法律，以危害國家安全爲理由，在內地取締的內地組織，均可被禁制。文件建議，把組織或支援被禁制組織的活動，以及管理這些組織或身爲其幹事，列爲罪行。在有需要情況下，任何與被禁制組織有聯繫的組織，均可被宣布爲非法組織。

「七宗罪」的最高刑罰爲終身監禁。而涉及的七宗罪更具備境外效力，若涉案人是香港永久居民，其身處的海外地方與香港有相關的引渡條例，即可被引渡回港治罪。

(資料來源：基本法第二十三條諮詢文件、明報)

同學投稿　　譚仲麟 BSS(GL) Year 3

The Law and Politics of the Article 23

Introduction

Depending on your stance, Article 23 can be described as a threat or a guarantee. It is a threat because it authorizes the Special Administrative Region (SAR) Government to legislate, on its own, to regulate political activities in the Region. It could be a disaster to the basic freedom of the residents and the city's civil society if the issue is improperly dealt with. It is a guarantee because it ensures, constitutionally, that activities endangering national security and integrity in the Region would be prohibited, despite the fact that the SAR is running a distinct legal system with Chinese criminal laws not applicable in it. This is exceptionally important to the concept of "One Country Two Systems" – maintaining the integrity of the country among regions running different systems.

Article 23 emerges in this constitutional context. There is always fear that granting region autonomy may encourage secessionists' activities in the autonomous entity. However, if CPG decided to make the part of Mainland's criminal laws concerning

national security applicable in the SAR, it would effectively violate the doctrine of "One Country Two Systems", which requires a high degree of separation between the two judicial systems. It is essential in "maintaining the prosperity and stability of Hong Kong"[1]. Therefore, the resolution adopted by the drafters is to grant the Region's legislature the autonomy to enact laws on several listed offences which the CPG intends to prohibit in the Region.

Article 23 – The Law

From plain reading of Article 23, it requires the prohibition of seven kinds of activities, namely treason, secession, sedition, subversion, theft of state secrets, foreign political organizations or bodies conducting political activities, political organizations or bodies establishing ties with foreign political organizations or bodies. Among them, only secession and subversion are not explicitly criminalized in common law or in statutes.

The following is an investigation on the legal framework under which any new security laws could be legislated. The major constraint of security laws comes from the Basic Law itself. It places a positive obligation to the government that it should safeguard the

[1] Preamble, The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.

rights and freedoms of the people (Article 4). It guarantees the residents of Hong Kong inviolable freedom of speech, press, publication, assembly, association, procession and demonstration (Article 27 and 28). Moreover, Article 39 of the Basic Law reads that:

"The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

Under the supremacy clause of Article 11(2)[2], the Government also claims that legislation enacted under Article 23 must conform to the ICCPR.[3] Rights to freedom of expression, peaceful assembly

[2] It reads that, "No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law."

[3] See Report of the Hong Kong Special Administrative Region of the People's Republic of China in the light of the International Covenant on Civil and Political Rights, para. 357.

and association are guaranteed under the ICCPR[4], although it allows restrictions on the exercise of the rights "conformity with the law and ...necessary in a democratic society". This "democratic necessity" standard placcs a duty on the Government to explain the direct connection between the restriction of the security laws and likely potential threat to the nation.

There is a three-pronged test in international law to justify whether a restriction on freedoms by national security grounds is valid. To be valid, the restriction must: (i) be provided by law; (ii) be an "established need for restrictive measures to protect national security"; and (iii) be kept at the "minimum necessary for that purpose".[5] The United Nations Human Rights Committee had urged several states whose legislation is found to broad or vague and contravene the Covenant to change its law. This creates the obligation to parties under this covenant to avoid restrictions on freedoms jeopardizing the right itself. For instance, to balance the protection of free speech and regulation of behaviours as the subject of laws, terms in laws must be clearly and narrowly defined

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[4] Article 19, 21 and 22, *the ICCPR*. See Appendix C.

[5] Elizabeth Evatt, "The International Covenant on Civil and Political Rights: Freedom of Expression and State Security" in Coliver, Sandra, et al., eds, *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information*, Martinus Nijhoff Publishers, The Hague, 1999, p. 86.

"to enable individuals to understand their obligations and to foresee whether particular action is unlawful"[6].

In the Committee's review of China's first report on Hong Kong, it expressed that "the offences of treason and sedition under the Crimes Ordinance are defined in overly broad terms, thus endangering freedom of expression guaranteed under Article 19 of the Covenant". It also urges the legislation under Article 23 to be consistent with the ICCPR.

Article 23 – The Politics

Politically, it had raised concerns and controversies before and after the handover. As a potential threat to its citizen's freedom and rights, Article 23 and its related offences became one of the foci of Sino-British conflicts before 1997. Its sensitivity also raised concerns whenever SAR and Chinese officials alleged statements on this Article or events concerning the related offences took place. During the 12 years since its promulgation, political parties attempted to limit the remit of Article 23 by introducing international standards or limiting requirements from other jurisdictions to the offences related. Interest groups also played the role of monitoring its implementation.

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[6] ibid.

Article 23 is political and sensitive. The politics of it involves the struggle between values of protecting rights and freedom and doctrine of protecting national unity and integrity. The sensitivity of it involves the particular difficulty in getting the balance point between them, and thus creating worries and fears of one trampling the other. Unfortunately, the matter remains unsettled five years after the handover. It is worthwhile for us to evaluate several possible exit strategies that may be undertaken by the SAR administration.

Amendment

This is probably the most favourite option of pro-democratic politicians and human rights fighters – to start the amendment procedure of the Basic Law so as to delete all or some of the offences to be prohibited in Article 23.

This can be an attempt, but the chance of success is simply too small. According to Article 159 of the Basic Law, the NPCSC, the State Council and the Hong Kong SAR can propose bills for amendment. For bills proposed by the SAR, it must obtain consent of two-thirds of the deputies of the SAR to the National People's Congress, two-thirds of all the members of the Legislative Council and the Chief Executive. The final power of amendment is vested with the National People's Congress.

It is clear that the NPCSC and the State Council are unlikely to propose such amendment bills. Nor the SAR Government would support such bill which opposes to the enormous interest of the State. The only chance is a motion debate moved by members in the Legislative Council. In the present political environment, a bill against the Government's will could not be passed easily in the Council. This stringent and complicated amendment procedure makes this option impractical.

Legislation

Eventually, this may be the unavoidable option under pressure from the CPG. Public and professional consultation should be conducted. To the minimal, the SAR Government had to introduce the offences of subversion and secession, which are absent in the statute books currently.

In the Mainland, subversion is defined as follows in Article 105 of the Criminal Law:

"Whoever organizes, plots, or acts to subvert the political power of the state and overthrow the socialist system ...

Whoever instigates the subversion of the political power of the state and overthrow the socialist system through spreading rumors, slandering, or other ways ..."

And in Article 103, secession is:

"Whoever organizes, plots, or acts to split the country or undermine national unification ...

Whoever instigates to split the country and undermine national unification ..."

Under such broad definition, speech or publications can be easily convicted. Everyone would understand that direct application of these definitions would be an infringement to the freedoms guaranteed in the Basic Law and the ICCPR. However, as the subject of subversion and secession is the People's Republic of China in the SAR, it is reasonable for the lawmakers to make reference to the definitions used in the Chinese Criminal Law. And this is the particular worry if the Government decides to go ahead with the enactment work.

There were discussions about the two offences when the colonial government tried to insert them into the Crimes Ordinance

in 1996.[7] Majority of public views objected to the invention of these two offences because the offences were effectively covered by treason in Section 2 and the public order was safeguarded by the Public Order Ordinance. Some other suggested adding a list of activities that could not be prosecuted (including protection of critic speech against government) or narrowing definition of crimes by inserting overt action, force, intent or "actual likelihood of incitement" requirement.[8]

The document of Johannesburg Principle on National Security, Freedom of Expression and Access to Information should receive some attention here. These principles were adopted by a group of experts in international law, national security and human rights in 1995. It requires all laws restricting freedoms to be "unambiguous, drawn narrowly and with precision" (Principle 1.1). Restriction

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[7] Subversion was defined as: " A person who (a) does any unlawful act with the intention of overthrowing the Government of the United Kingdom by force; (b) incites or conspires with any person to overthrow the Government of the United Kingdom by force; or (c) attempts to overthrow the Government of the United Kingdom by force, is guilty of subversion and liable on conviction on indictment to imprisonment for 10 years."
Secession was defined as: "A person who incites or conspires with any other person or who attempt to supplant by force the lawful authority of the Government of the United Kingdom in respect of any part of the United Kingdom or in respect of any British dependent territory is guilty of secession and liable on conviction on indictment to imprisonment for 10 years."

[8] See Paper for the House Committee meeting on 13 June 1997, *Report of the Bills Committee on the Crimes (Amendment)(No. 2) Bill 1996.*

should be "the least restrictive means possible for protecting that interest" (Principle 1.3(b)). Punishable expression only if it intends "to incite imminent violence" and "is likely to incite such violence" (Principle 6). Where criticism and insult should not be considered to constitute a threat to nation (Principle 7(ii)).

These principles are just recommendations made by human rights organization to the state when considering their laws. However, if SAR Government is really to take step in legislation on Article 23, reference to these principles is another assurance. If considering the compatibility of anti-subversion laws with the Principles, one should be cautious that secession is often misused to punish non-violent advocacy of change of government, which is protected under Principle 7. Also, as any violent threatening activity aiming at changing the political status could be effectively dealt with by treason and other public order laws, anti-secession laws would be duplicatory and violates the "narrowest restriction possible" principle.[9]

Doing nothing approach?

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[9] These two views are adopted from the Hong Kong Human Rights Monitor. See their report *"A Ticking Time Bomb? Article 23, Security Law and Human Rights in Hong Kong"*.

It is the view advocated by legal professions and human rights groups that Article 23 does not create an obligation for the SAR Government to create all the offences listed statutorily. "As long as all of the acts listed are covered by law, the requirements of Article 23 are met"[10]. It is argued that if "secession" and "subversion" were narrowly defined, they would be covered by the treason offences and punishable by other security laws. Therefore, an absence of the two offences does not mean a violation of Article 23.

[10] Ibid., p.3.

喂，你點睇？

全國政協副主席霍英東：「二十三條立法，關係國家安全，不是有沒有言論自由的問題。香港市民的言論自由，已由基本法其他條文及特區政府已經簽署的《國際人權公約》提供保障，二十三條立法正是一種必要的平衡。所以特區政府應該爲二十三條立法，而作爲中國公民的一分子，支持二十三條立法是義不容辭的責任。」

中聯辦主任高祀仁：「香港是一個充滿自由和民主的社會，二十三條的立法，更加有利維護國家的安全與統一，有利香港市民的正常生活，有利香港繁榮穩定，有利香港改善與鞏固現有優良的營商環境。香港市民一定會非常擁護特區政府的立法。」

港區全國人大代表吳康民：「基本法規定了有二十三條，特區政府經過五年也不立法，是講不過去的。」

基本法委員會委員鄔維庸：「預防針一出生便要打，不是有病才打，因此特區成立時便應該立法，現在是五年，已經太遲。」

律政司司長梁愛詩：「諮詢期會聽公眾的意見，意見好的當然會聽，但不是所有的意見，大家說怎樣就怎樣。」

行政會議成員、民建聯主席曾鈺成：「落實《基本法》第二十三條並不是訂立一條全新的法例，許多條文都只是將現有的法律條文作出適當的修訂，令有關罪行的定義更爲清晰，甚至有建議的條文較現行的條文還要寬鬆的情況，故落實立法並不會對本港市民現時所享自由和權利有所限制及剝削。」

立法會議員、支聯會主席司徒華：「法例是針對傳媒，令傳媒畏懼犯法而自我審查。我們反對政府就二十三條立法，但即使立法，我們也不會畏懼和退縮，會繼續堅持原則，要求平反「六四」、追究「六四」屠城的責任，以及要求釋放民運人士。」

香港法輪功發言人簡鴻章：「政府透過廿三條立法侵害人權及言論自由、藉此打壓法輪功，破壞一國兩制。不過就算立法，香港法輪功也不應被視爲非法組織，因爲我們是獨立團體，與其他地方的團體絕無從屬關係，包括內地的法輪功組織。」

本港親台團體港九工團總會主席李國強：「將來舉辦雙十活動，會被視爲分裂國家，立法後更可能會影響港、台間的民間交流活動，團體會擔心觸犯法例而避忌，令港、台關係倒退。」

香港記者協會：「香港社會穩定，國家的安全亦未見受到巨大威脅，故此現時並無迫切需要就基本法第二十三條立法展開籌備工作。立法建議的寒蟬效應會令民眾和傳媒自我約制，令有關言論不能在社會上自由表達。而當局建議引入新的罪行，其中定義亦過於空泛，可能令處理有關資訊的新聞工作者容易誤墮法網，不利言論自由的落實。」

立法會議員、資深大律師余若薇：「政府官員已表明會就第二十三條立法問題諮詢中央當局，令人憂慮的是，若中央就法例內容拍了板，特區政府還有修訂空間嗎？屆時政府即使諮詢公眾意見，亦不過是假諮詢。」

《華爾街日報》網上版：「過去五年不斷以剝奪港人權益、討好中央政府的特首董建華，再要港人付出權利被削的代價。」

森仔 (社科一年級):「政府說明要有實際顛覆分裂等行爲才會入罪，市民恐怕以言入罪未免杞人憂天，但如果法例可再寬鬆些當然更好。」

劉同學 (房建系一年級):「我對此事也不太了解，但立法看來已事在必行了。我認爲如果由法院來掌握下禁制令的權力會好些，始終讓政府有太多權力不太好。」

袁同學 (理學院二年級):「若說要用二十三條把罪名強加一人身上，用其他條例也可以。」

許同學 (理學院一年級):「二十三條挾制港人發表政見的自由，如以前六四事件，港人可上街遊行而不被干預，現在有了二十三條，港人示威必遭干預。」

Phoebe (文學院二年級):「是次立法中有關罪行的定義不清晰，由於欠缺一個公眾認同的定義，立法或執法的部門會面對很大壓力。」

Yim Yu (土木工程二年級):「我唔係太了解第廿三條講乜嗎 ……」

李同學 (經管一年級)：「我贊成立法。在一國兩制下，一國應爲大前題。立法有助香港避免成爲顛覆國家份子的基地。」

區同學 (工管(資訊系統)一年級)：「我贊成立法，這對香港的治安有幫助，避免滋事份子在港搞事。亦信任香港政府不會胡亂執行。」

阿嘉 (文學院二年級)：「我對此事沒有太深的了解，不過覺得中央的權力開始滲透入香港。」

崔同學 (文學院一年級)：「反對立法，因這是言論自由的倒退。香港政府爲討好中央而導致香港人心徨徨實不值得。」

譚同學 (政治與法學三年級)：「立法，是時候了。不過，每人對『一國』和 『兩制』的闡釋也不同，有關條文草案細節之鬆緊則是最惹爭論的地方。」

阿德 (醫學院二年級)：「立法好像跟我沒甚麼關係，不過身邊的同學都似有很大反應。」

(資料來源：大公報、明報、東方日報、並鳴謝各位同學接受訪問)

意見表

各位對基本法第二十三條及其影響有初步的了解後，有甚麼意見不吐不快呢？請快填妥以下表格，交回 KKLG111 本會會房，本會將把意見收集整理，然後呈交保安局。

姓名：_____ 性別：_____ 年齡：_____

職業：_____ 就讀學校/學科/年級：_____

對基本法第二十三條的意見：

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謝謝您的意見！

二零零二年香港大學學生會社會科學學會